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Child Abuse: Should You Report It?

David F. Forte

Cleveland State University, d.forte@csuohio.edu

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Child Abuse: Should You Report It?

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CHILD ABUSE: Should You Report It?

There is no class of persons more vulnerable to the violent proclivities of others than children. Any child in any economic class may suffer the terrors of sexual or physical assault and mistreatment from adults. Many children live with violence in their schools, in their neighborhoods, and in their homes. Indeed, abortion assures that one third of our offspring never make it through pregnancy and, for many that do, they are damaged from birth by drug or alcohol addiction.

But of all the dangers children are subject to, abuse by parents, guardians, and relatives is a problem that lawyers, among other professionals, have been specifically called upon to address. Even discounting better reporting statistics, incidents of this kind of child abuse seems to be on the increase. One report suggests that in 1989, there were over two million instances of child abuse in the country. Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney Client Confidences: The Reality and Specter of Lawyer as Informant*, 42 Duke L.J. 203 (1992).

Frequently, domestic relations attorneys carry the burden of such terrible knowledge from their clients. Recently, many attorneys have asked whether, under the Code of Professional Responsibility, they may report such facts to appropriate public service agencies.

There are remarkably common fact patterns to these cases. A woman seeks a divorce and settlement from her husband. She has left the home and taken their child with her. She wants permanent custody. She confides in her attorney that the husband has been abusive to her and her child — but insists that the attorney keep the confidence lest the husband retaliate against her.

Domestic relations attorneys are familiar with the rising charges of abuse by one partner or another as ammunition in custody battles. But in many cases, the attorney has reason to believe that his client is telling the truth.

The awful dilemma occurs when the client decides to forego divorce proceedings and return with the child to the abode of her spouse. She can provide no assurance that the abuse will cease. Can the attorney do anything, except

remonstrate with his client, to save the child?

There is no doubt but that the lawyer's knowledge is a confidence or



a secret under DR 4-101(A) of the Code of Professional Responsibility.

"'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relation that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

As such, DR 4-101(B) and (C) prohibit a lawyer from knowingly revealing that confidence or secret unless the client has consented after full disclosure, DR 4-101(C)(1), or if the lawyer is "required by law or court order" to reveal the confidence or secret. DR 4-101(C)(2). Alternatively, the lawyer may, but is not required to, reveal information necessary to prevent a crime that his client intends to commit. DR 4-101(C)(3).

Commonly, the client has not consented to the lawyer's revealing the abuse to the appropriate state agencies. From apparent fear, she has, in fact, specifically directed the lawyer not to tell anyone about the abuse.

Nonetheless, the Code of Professional Responsibility requires the divulging of those confidences or secrets that are required by law. Ohio is

among 22 states that require at least limited reporting by attorneys of instances of child abuse. Mosteller, *Child Abuse Reporting Laws*, at 217.

The state of Ohio has dealt with the issue of reporting child abuse in Ohio Revised Code §2151.421. O.R.C. §2151.421(A)(1) requires that

"No attorney . . . who is acting in his official or professional capacity and knows or suspects that a child under eighteen years of age . . . has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report . . . that knowledge or suspicion to [the appropriate state or county agency or municipal or county peace officer]."

Failure to report is a misdemeanor of the fourth

degree. O.R.C. §2151.99(A).

However, the same statute makes the following exception for confidences protected by the attorney/client privilege:

"An attorney is not required to make a report concerning any communication made to him by one of his clients in the attorney-client relationship [unless] all the following apply:

"(a) The client, at the time of the communication, is either a child under eighteen years of age or a physically or mentally handicapped person under twenty-one years of age;

"(b) The attorney knows or suspects, as a result of the communication of any observations made during that communication, that the client has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the client;

"(c) The attorney-client relationship does not arise out of the client's attempt to have an abortion without the notification of her parents . . ." O.R.C. §2151.421(A)(2). Cf. O.R.C. §2317.02 (Privileged Communications and Acts).

Thus, when the attorney's client is the mother of the child and she is neither "a child under eighteen years of age or a physically or mentally handi-

capped person under twenty-one years of age," the attorney is exempted from reporting confidences received from his client.

If, however, the attorney received information from someone other than his client — perhaps from interviewing the child or from neighbors incident to a petition for custody — it would constitute a secret under DR 4-101(A) and not a confidence protected by O.R.C. §2317.02. Secrets as such are not exempted from the reporting requirements of O.R.C. §2151.421, which exempts only communications by the client — *i.e.*, confidences. In this circumstance, the lawyer may very well be legally obligated to inform the appropriate authorities of the abuse. In other jurisdictions, prosecutions for failure to report instances of child abuse are increasing, though attorneys by and large thus far seemed to have escaped sanction. Mosteller, *Child Abuse Reporting Laws*, at 217 n.41.

Compulsory reporting of the child abuse may possibly also occur if the lawyer refers his client to counseling with a health care professional or social worker who in turn may be required to lodge a report. Unless the client were the object of criminal charges, a Sixth Amendment bar to revealing the confidence would not seem to be available. The Maryland attorney general opined that even if the health care professional received the information under the attorney/client privilege, the reporting requirements of Maryland law take precedence. Mosteller, *Child Abuse Reporting Laws*, at 217 n.203, citing Op. Md. Att'y No. 90-007 (Feb. 8, 1990).

Presuming, however, that the attorney received knowledge of the child abuse as a confidence from his client, and that he was exempted from the reporting requirements of Ohio law, his remaining options are left to the provisions of the Code of Professional Responsibility.

The remaining question, then, is whether the attorney may reveal that confidence because it constitutes "information necessary to prevent [a] crime" that his client intends to commit. DR 4-101(C)(3). If so, the attorney is permitted under the Code of Professional Responsibility to reveal his client's confidences, but he is not required to do so. DR 4-101(C).

Does the fact that the lawyer's client,

"The awful dilemma occurs when the client decides to forego divorce proceedings and return with the child to the abode of her spouse. She can provide no assurance that the abuse will cease."

the mother, is returning to the home of her husband where spousal and child abuse has occurred and may continue to occur indicate any "intention of his client to commit a crime?" DR 4-101(C)(3). O.R.C. §2919.22, entitled, *Endangering Children*, provides:

"(A) No person, who is the parent . . . of a child under eighteen years of age . . . shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support."

In *State v. Wardlow*, 20 Ohio App. 3d 1, 484 N.E. 2d 276 (Hamilton County 1985), a mother was convicted of child endangerment under O.R.C. §2919.22(A) when her daughter told her mother that her mother's live-in paramour had raped her and the mother failed to remove her child from the home or to expel the paramour.

In 1992, the Professional Ethics Committee of the Cleveland Bar Association concluded that if an attorney reasonably believed that his client would be committing a breach of O.R.C. §2919.22(A) by bringing her child back to a home where abuse has occurred and will likely occur, the attorney would be permitted under DR 4-101(C)(3) of the Code of Professional Responsibility to report any confidences indicating child abuse in order to prevent the crime of child endangerment. *Cleve. Bar Ass'n Professional Ethics Comm.*, Op. No. 92-2 (July 17, 1992).

Opinions from other jurisdictions are in accord. In a case where the client was the perpetrator of the abuse, the North Carolina State Bar Association declared that "disclosure would be authorized, in the lawyer's discretion, under the exception to the confidentiality rule regarding a client's intention to commit a crime." *N.C. St. Bar Ethics Comm.*, Op. RTC 120 (July 17, 1992). The State Bar of Wisconsin similarly affirmed that the lawyer could report such continuing abuse under laws prohibiting child endangerment, and further noted that the lawyer can report the abuse "regardless of whether the abuser is the client or someone else." *Wis. St. Bar*

Comm. on Professional Ethics, Formal Op. E-88-11 (Dec. 7, 1988). The only jurisdiction that limited the lawyer's discretion to report is Vermont, where the attorney, contrary to his client's specific directions not to reveal the fact to her husband's attorney, told opposing counsel of the allegation of abuse. But in that case, the attorney revealed the confidence not to prevent a crime but in order to try to reach a favorable settlement. *In re Pressly*, 628 A.2d 927 (Vt. 1993).

Some jurisdictions operating under the Model Rules of Professional Conduct permit the divulging of confidences or secrets only to prevent the most serious crimes. Model Rules of Professional Conduct, Rule 1.6(b)(1)(1989). The Kentucky Bar Association opined that reporting may take place "to the extent necessary to prevent further criminal conduct likely to result in imminent death or substantial bodily harm." *Ky. Bar Ass'n*, Op. E-360 (Sept. 11, 1993). Nonetheless, unless loosely defined by statute, child abuse is seen in all jurisdictions as a very serious crime. *See* O.R.C. §2919.22, cmt. (law aimed at abuse that "poses a serious risk to the mental or physical health or safety" of the child). *Indianapolis Bar Ass'n Legal Ethics Comm.*, Op. No. 1-1986 (Apr. 29, 1986) (noting the gravely damaging nature of child abuse).

In addition, under the Code of Professional Responsibility, an attorney may divulge a confidence or secret only if he has a reasonable belief that a crime will occur. *Pa. Bar Ass'n Comm. on Legal Ethics and Professional Responsibility*, Op. No. 88-42; *Va. St. Bar Ass'n Standing Comm. on Legal Ethics*, Op. No. 1355 (May 24, 1990). *Cf.* Model Rules of Professional Conduct, Rule 1.6, cmt. at 23; *Indianapolis Bar Ass'n Legal Ethics Comm.*, Op. No. 1-1986 (Apr. 29, 1986).

A reasonably perspicacious attorney, however, can readily distinguish between a pattern of child abuse, which

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after he secured a \$4 million personal loan to buy 524 acres of woods and wetlands for the Geauga County Parks District. Developers had bid for the land — which includes blue heron rookeries, wild turkeys, a cave, and a waterfall — and the District had only weeks to raise the funds. Mr. Ginn, a longtime community activist, said he helped save the land “because it was needed, because I live there, and our family is interested in the environment.”

Judge J. WILLIAM McCRAY, former judge of the Elyria Municipal Court and onetime Lorain County assistant prosecutor, praised the GI Bill enacted for World War II veterans in a *PD* article. Judge McCray says he held little hope of getting an education until the act was passed. Some 15 million veterans took advantage of the bill that was signed into law by President Franklin D. Roosevelt 50 years ago.

ANNE MARIE REIDY of Calfee, Halter & Griswold wrote an article entitled “You Can Exercise Creativity Every Day” for the *PD*’s *Everywoman* section. In the article, she encouraged women to “expand their definition of creativity” and forget the childhood lessons of always “drawing inside the lines.”

Law Firm Notes

Benesch, Friedlander, Coplan &

Aronoff has moved its offices to Suite 2300 of the BP America Building, 200 Public Square, Cleveland 44114-2378. Phone numbers remain the same.

Thompson, Hine and Flory will leave its offices, which it has occupied for more than 70 years, in the National City

If you or a member of your firm has received an award, participated in a newsworthy event, moved your office, or been appointed or elected to a new office, we invite you to share your news with the rest of our membership. Please send your item to Lawyers in the News, c/o Horwitz & Horwitz, 2000 Illuminating Building, Cleveland 44113, phone 771-4606.

Bank Building and move to six-and-one half floors in the Society Tower in late 1995.

Cuyahoga Bar Association Moves

The new address of the Cuyahoga County Bar Association is Suite 500 of the Terminal Tower, Cleveland 44113-2203. Phone and fax numbers remain the same.

In Memoriam

Charles W. Fleming, presiding judge of Cleveland Municipal Court; on July 11. The beginning of Judge Fleming’s career coincided with the emergence of the civil rights movement of the 1960s. He was first elected to the bench in 1975, and he was elected to his fourth six-year term last year. Judge Fleming was the first black president of the Ohio Association of Municipal/County Judges. He had been hospitalized since he was involved in a car crash on June 18.

Joseph A. Coviello (May 19, 1994)

Robert L. Gray (July 27, 1994)

Fred F. Hilow (July 3, 1994)

Richard I. Klein (July 26, 1994)

J. David Horsfall (July 3, 1994)

Joseph A. Ranallo (July 11, 1994)

Michael Shane (Feb. 22, 1994)

Information on deaths of our members is sometimes delayed but is printed as soon as it is received by the association’s office. ■

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very likely will continue, and an isolated event that occurred in the past. In Massachusetts, an ethics opinion allowed an attorney to divulge his client’s past conviction of child abuse when the lawyer discovered that his client had taken on a new position caring for young children. The only proviso was that lawyer must have a reasonable belief that his client would commit a criminal offense against the children he would be supervising. Mass. Bar Ass’n Comm. on Professional Ethics, Op. No. 90-2 (June 15, 1990). See also

Indianapolis Bar Ass’n Legal Ethics Comm., Op. No. 1-1986 (Apr. 29, 1986) (discussing the likelihood of repetition of abusive acts).

The Opinion of the Cleveland Bar Association summarized the lawyer’s obligations this way:

“An attorney may reveal a confidence or secret of his client indicating child abuse if a) the client has consented after full disclosure, b) the attorney reasonably believes that he is required to do so by law, or c) the attorney reasonably believes that his client will be endangering the child contrary to law and that the disclosure of the confidence or secret will prevent the crime.”

Cleve. Bar Ass’n Professional Ethics Comm., Op. No. 92-2 (July 17, 1992).

So interpreted, the Code of Professional Responsibility provides an answer that protects the confidences of the client except in those cases where a vulnerable and exposed child is about to be the victim of the client’s own criminal actions. In these cases at least, the attorney may throw a lifeline to that lonely victim. ■

About the Author . . .

David Forte, professor of law at Cleveland-Marshall College of Law, is past chair of the Professional Ethics Committee. Opinions expressed herein are those of the author.